IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WILLIE LEE BROWN, JR.,	:	
Petitioner,	:	CIVIL ACTION 10-0586-KD-M
v.	:	CRIMINAL ACTION 06-00258-KD-M
UNITED STATES OF AMERICA,	:	
Respondent.	:	

REPORT AND RECOMMENDATION

Pending before the Court is Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (Docs. 36, 38). This action was referred to the undersigned Magistrate Judge for report and recommendation pursuant to 28 U.S.C. § 636(b) and Rule 8(b) of the Rules Governing Section 2255 Cases. It is now ready for consideration. The record is adequate to dispose of this matter; no evidentiary hearing is required. It is recommended that Petitioner's Motion to Vacate (Docs. 36, 38) be denied, that this action be dismissed, and that judgment be entered in favor of Respondent, the United States of America, and against Petitioner Willie Lee Brown, Jr.

Petitioner was indicted on November 28, 2006 for one count of conspiring to unlawfully distribute crack cocaine in violation of 21 U.S.C. § 846 and four counts of knowingly and

intentionally possessing, with intent to distribute, crack cocaine in violation of 21 U.S.C. § 841(a)(1) (Doc. 1). On September 24, 2008, Brown entered into a plea agreement in which he pled guilty to one count of knowingly possessing, with the intent to distribute, crack (Doc. 20). On December 3, 2009, United States District Judge DuBose sentenced Petitioner to six years on the conviction as well as four years of supervised release following his release from prison, and an assessment of one hundred dollars (Doc. 35). Brown did not appeal either the conviction or his sentence (*see* Doc. 36, pp. 1-2).

Petitioner filed his Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 on October 6, 2010 in which he raised particular claims of ineffective assistance that his attorney failed to: (1) object when the Court did not apply *Kimbrough v. United States* in sentencing him; (2) properly prepare for the case; and (3) file a appeal on his behalf (Doc. 36).[1] On November 24, Petitioner filed a Supplement in which he requested that the Court take judicial notice of the 2010 Fair Sentencing Act which modified guidelines to recommend shorter sentences for crack offense (Doc. 38). Respondent filed a

[1]The Court notes that Brown originally raised another particular claim that his attorney failed to object to the Court's upward departure in sentencing him (Doc. 36, p. 4); Petitioner has since dropped this claim from consideration (Doc. 43, p. 1).

response on December 8, 2010 (Doc. 42) to which Petitioner replied (Doc. 43).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court defined the showing a habeas petitioner must make to prevail on an ineffective assistance claim:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the sixth amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

Brown first claims that his attorney rendered ineffective assistance in that he failed to object when the Court did not apply *Kimbrough v. United States*, 552 U.S. 85 (2007) in sentencing him (Doc. 36, p. 4). As stated by Respondent, the *Kimbrough* "Court held that district courts have the discretion to vary from the federal sentencing guidelines governing crack

cocaine offenses if those guidelines result in a sentence greater than necessary to achieve the statutory purposes of sentencing under 18 U.S.C. § 3553(a)" (Doc. 42, p. 4); *cf. Kimbrough*, 552 U.S. at 91.

In this action, it is noted that Judge DuBose found that Petitioner's sentencing guideline range was 168 to 210 months (*see* Doc. 41, pp. 54-55).[2] The Judge, however, stating that this "way over represents [Brown's] criminal history," noted the five-year mandatory minimum before sentencing Brown to six years in prison; Dubose very clearly stated that this was "a variance from the guidelines" (*id.* at p. 60).

The Court finds no merit in Petitioner's claim in that the Court availed itself of the *Kimbrough* holding in sentencing Brown to eight years less than the recommended minimum sentence of fourteen years. Petitioner has not suffered ineffectiveness of counsel in this regard.

Brown next claims that his attorney was ineffective in that he did not properly prepare for the case. Petitioner more particularly states that his lawyer "only met with [him] a couple of times for short periods. [His] attorney did not discuss the facts of the case with [him]. [His] attorney did

[2]The Court is using the Adobe Acrobat pagination system rather than that of the Court Reporter transcribing the hearing.

not explain or discuss the Government's case or [his] defense. [His] attorney did not discuss the sentencing guidelines, enhancements or grounds for appeal" (Doc. 36, p. 4).

Even if the Court accepted Petitioner's assertions as true, Brown has failed to show how he was prejudiced by his attorney's deficiencies. As such, the Court finds that Petitioner has failed to satisfy the requirements of *Strickland*.

Brown has also claimed that his attorney rendered ineffective assistance in that he did not file a appeal on his behalf. Petitioner more particularly asserts that his attorney told him there were no issues for appeal (Doc. 36, p. 5). Brown has further asserted that if he had been properly informed, he would have insisted on an appeal to keep his "case open to take advantage of any changes in the law" (Doc. 43, p. 2).

Petitioner has failed to state what particular claims could—and should—have been raised on appeal. A general assertion that claims could have been raised does not satisfy his *Strickland* burden of proving that he has been prejudiced.

Finally, Brown has asserted that the Court should take judicial notice of the 2010 Fair Sentencing Act (hereinafter *FSA*) (Doc. 38). The Court notes that the FSA, which amended the sentencing provisions for crack cocaine, was signed into law on August 3, 2010 and specifically states that it was not to be

applied retroactively. *United States v. Gomes*, 621 F.3d 1343, 1346 (11th Cir. 2010) (*citing* 1 U.S.C. § 109). As Petitioner was sentenced on December 3, 2009, the FSA is not applicable to his sentence under *Gomes*.

Brown has raised two claims in this petition. Both are without merit. Therefore, it is recommended that the petition be denied (Docs. 36, 38), that this action be dismissed, and that judgment be entered in favor of Respondent, the United States of America, and against Petitioner Willie Lee Brown, Jr.

Furthermore, pursuant to Rule 11(a) of the Rules Governing § 2254 Cases, the undersigned recommends that a certificate of appealability (hereinafter *COA*) in this case be denied. 28 U.S.C. foll. § 2254, Rule 11(a) ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). The habeas corpus statute makes clear that an applicant is entitled to appeal a district court's denial of his habeas corpus petition only where a circuit justice or judge issues a COA. 28 U.S.C. § 2253(c)(1). A COA may issue only where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Inasmuch as the Court has found that Brown has failed to assert sufficient facts to support a claim of constitutional error, "[t]he petitioner must demonstrate that

reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). It is suggested that Brown will not be able to make that showing.

CONCLUSION

The undrsigned recommends that Brown's petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, be denied. It is further recommended that Petitioner is not entitled to a certificate of appealability and, therefore, not entitled to appeal *in forma pauperis*.

MAGISTRATE JUDGE'S EXPLANATION OF PROCEDURAL RIGHTS AND RESPONSIBILITIES FOLLOWING RECOMMENDATION AND FINDINGS CONCERNING NEED FOR TRANSCRIPT

1. **Objection**. Any party who objects to this recommendation or anything in it must, within ten days of the date of service of this document, file specific written objections with the clerk of court. Failure to do so will bar a de novo determination by the district judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the magistrate judge. See 28 U.S.C. § 636(b)(1)(C); *Lewis v. Smith*, 855 F.2d 736, 738 (11th Cir. 1988); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B, 1982)(en banc). The procedure for challenging the findings and recommendations of the magistrate judge is set out in more detail in SD ALA LR 72.4 (June 1, 1997), which provides that:

> A party may object to a recommendation entered by a magistrate judge in a dispositive matter, that is, a matter excepted by 28 U.S.C. § 636(b)(1)(A), by filing a "Statement of Objection to Magistrate Judge's Recommendation" within ten days after being served

> with a copy of the recommendation, unless a different time is established by order. The statement of objection shall specify those portions of the recommendation to which objection is made and the basis for the objection. The objecting party shall submit to the district judge, at the time of filing the objection, a brief setting forth the party's arguments that the magistrate judge's recommendation should be reviewed de novo and a different disposition made. It is insufficient to submit only a copy of the original brief submitted to the magistrate judge, although a copy of the original brief may be submitted or referred to and incorporated into the brief in support of the objection. Failure to submit a brief in support of the objection may be deemed an abandonment of the objection.

A magistrate judge's recommendation cannot be appealed to a Court of Appeals; only the district judge's order or judgment can be appealed.

2. **Transcript (applicable where proceedings tape recorded)**. Pursuant to 28 U.S.C. § 1915 and Fed.R.Civ.P. 72(b), the magistrate judge finds that the tapes and original records in this action are adequate for purposes of review. Any party planning to object to this recommendation, but unable to pay the fee for a transcript, is advised that a judicial determination that transcription is necessary is required before the United States will pay the cost of the transcript.

DONE this 5th day of April, 2011.

s/BERT W. MILLING, JR.
UNITED STATES MAGISTRATE JUDGE